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IN THE
COURT OF APPEALS OF INDIANA

ROBERT P. BASTON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 69A01-1008-CR-401
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0909-FA-3

May 27, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Robert Paul Baston ("Baston") was convicted in Ripley Circuit Court of Class A felony child molesting and sentenced to forty years incarceration. Baston appeals and presents five issues, which we restate as:

I. Whether the charging information permitted the jury to reach a non-unanimous verdict and therefore amounted to fundamental error;

II. Whether the charging information failed to include a definite statement of the essential elements constituting the offense charged and therefore amounted to fundamental error;

III. Whether the trial court abused its discretion in refusing to give to the jury an instruction proffered by Baston regarding spoliation of evidence;

IV. Whether the trial court abused its discretion in finding certain aggravating factors when sentencing Baston;

V. Whether Baston's forty-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

Facts and Procedural History

On August 16, 2009, Baston's mother had a cookout and pool party at her house, where Baston also lived. Two of the guests at the party were six-year-old A.P. and her father. A.P. and other children played in the pool, but at one point A.P. left the pool area wearing her swimsuit, which was clean at that time. Baston met A.P. in a part of his mother's house and, without telling anyone, took A.P. for a ride on his four-wheel vehicle. Baston drove approximately 600 yards away from the house to an undeveloped area which was partially hidden from view. There, Baston stopped the vehicle and pulled the crotch of A.P.'s swimsuit to the side and performed oral sex on her genital area. Baston then put A.P. on the ground and, as A.P. later explained, "rubbed his private on

my private." Tr. p. 453. A.P. stated that this caused her pain and "soap" came out of Baston's penis. Id. at 533. After he was finished molesting A.P., Baston placed the child back on his vehicle and drove her back to the party.

Meanwhile, A.P.'s father and other adults were looking for A.P. after noticing that she was missing. When A.P. saw her father, she got off Baston's vehicle and began to cry. She told her father that Baston had "touched her pee-pee" and "licked her pee-pee and put his on hers." Tr. pp. 836-38, 881. Baston stated that A.P. was lying, to which A.P. responded by pointing her finger at Baston, raising her voice and saying, "yes you did, you are a liar." Tr. p. 883. The back of A.P.'s swimsuit was dirty when she returned.

A.P. was later taken to Cincinnati Children's Hospital, where she was examined. The examination revealed that A.P.'s had abrasions on her posterior fourchette,[1] and redness in two areas near her hymen. Hospital personnel notified the police, who recovered A.P.'s swimsuit. Forensic analysis of the swimsuit revealed that the inside crotch of the swimsuit contained two areas of mixed DNA from two individuals. In the first area, Baston was the main contributor of DNA and A.P. was the minor contributor. In the other area, A.P. was the main contributor of DNA and Baston was the minor contributor.[2] The odds of the DNA matching Baston and also matching another unknown person were one in twenty-four trillion.

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[1] The fourchette is "a small fold of membrane connecting the labia minora in the posterior part of the vulva." http://www.merriam-webster.com/medical/fourchette.

[2] Tests on a third area were less conclusive, but neither Baston nor A.P. could be excluded as DNA contributors.

The case was initially assigned to Milan Police Officer Phillip Wilson ("Officer Wilson"), who interviewed several people who lived near Baston. These individuals explained that they had seen a vehicle similar to Baston's, but did not recall seeing a child on the vehicle. Wilson also spoke with Baston's brother, who told him of an undeveloped area where Baston had ridden his vehicle on previous occasions. Wilson took digital photographs of this area.

Eventually, Milan police asked Indiana State Police Detective Tracy Rohfling ("Detective Rohfling") to take over the investigation. Detective Rohfling agreed, and Milan police briefed him on the investigation they had undertaken thus far. Officer Wilson told Detective Rohfling about the digital photographs he had taken, but did not provide them to Rohfling. Wilson later deleted the photographs.

On September 1, 2009, the State charged Baston with Class A felony child molesting. A jury trial was held on June 1, 2010, and the jury found Baston guilty as charged on June 4, 2010. A sentencing hearing was held on July 16, 2010, at which the trial court sentenced Baston to forty years executed, and found Baston to be a credit-restricted felon. Baston now appeals.

I. Duplicitous Charging Information

Baston first claims that the information charging him with Class A felony child molesting was improper because it was duplicitous and permitted the jury to return a non-unanimous verdict. "One of the well-established rules of criminal pleading is that there can be no joinder of separate and distinct offenses in one and the same count. A single count of a charging pleading may include but a single offense." Vest v. State, 930

N.E.2d 1221, 1225 (Ind. Ct. App. 2010). When one count improperly alleges two or more separate offenses, "duplicity" occurs. Id. Duplicity is unacceptable because it "'prevents the jury from deciding guilt or innocence on each offense separately and may make it difficult to determine whether the conviction rested on only one of the offenses or both.'" Id. (quoting 5 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(c) (3d ed. 2007)). Whether a charging instrument is duplicitous generally turns on a proper construction of the criminal statute at issue. Id.

The State may, however, allege alternative means or theories of culpability when prosecuting the defendant for a single offense. Id. As our supreme court stated in Cliver v. State, 666 N.E.2d 59, 67 (Ind. 1996), there is no error when the State "merely present[s] the jury with alternative ways to find the defendant guilty as to *one element*." "'[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.'" Id. (quoting Schad v. Arizona, 501 U.S. 624, 631-32 (1991) (Souter, J., plurality opinion)); accord Vest, 930 N.E.2d at 1225-26.

Baston admits that he did not challenge the charging information by way of a motion to dismiss or otherwise. He has therefore failed to preserve this issue for appeal. See Stevens v. State, 913 N.E.2d 270, 278-79 (Ind. Ct. App. 2009) (a challenge to the adequacy of a charging information must be made by a motion to dismiss prior to arraignment or the issue is waived); Vaillancourt v. State, 695 N.E.2d 606, 610 (Ind. Ct. App. 1998) ("The proper time for raising the insufficiency of the charging information is prior to arraignment."). Baston attempts to avoid waiver by arguing that the alleged duplicity in his charging information constitutes fundamental error. The fundamental

error exception to the contemporaneous objection rule is extremely narrow, and applies only where the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. Vest, 930 N.E.2d at 1225-26 (citing Brown v. State, 929 N.E.2d 204 (Ind. 2010)). The claimed error must either make a fair trial impossible or constitute a clearly blatant violation of basic and elementary principles of due process. Id.

Baston claims that the information charging him with child molesting was duplicitous because it permitted the jury to find that he committed child molesting either by having sexual intercourse with A.P. or by performing deviate sexual conduct on A.P. The charging information at issue here reads in relevant part:

> On or about August 16, 2009, in Ripley County, State of Indiana, Robert Paul Baston, did perform or submit to sexual intercourse or deviate sexual conduct with A.P. At the time Robert Paul Baston was at least 21 years of age . . . and A.P. was a child under 14 years of age[.]

Appellant's App. p. 15.

As noted by Baston, sexual intercourse and deviate sexual conduct are separate acts defined under the Indiana Code. "'Sexual intercourse' means an act that includes any penetration of the female sex organ by the male sex organ." Ind. Code § 35-41-1-26 (2004). And "'[d]eviate sexual conduct' means an act involving (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9 (2004). Baston argues that the charging information alleging that he committed "sexual intercourse" or "deviate sexual

conduct" with A.P. charged two separate offenses and permitted the jury to disagree as to which of the two crimes he committed.

In support of his argument, Baston cites Marshall v. State, 602 N.E.2d 144 (Ind. Ct. App. 1992), trans. denied. In that case, the defendant had been arrested after touching the genital area of an undercover police officer in a public restroom. The information charging the defendant with public indecency stated that he "did unlawfully and knowingly, in a public place . . . (engage in the act of sexual intercourse) (engage in deviate sexual conduct, to-wit: _____) (appear in a state of nudity) (fondle the genitals of [an undercover police officer])." Id. at 148. The information was based on a pre-printed form, and whoever filled out the form had failed to delete the inapplicable portions of the form. The Marshall court stated that this appeared to have the effect of charging the defendant with all four varieties of public indecency. Id. at 149. The court therefore concluded that the information was "bad for duplicity and could not have withstood attack by a timely motion to dismiss." Id. The court held, however, that the problem with the information was *not* fundamental error because it alleged that the defendant fondled the genitals of the undercover officer on a specific date and location and the defendant failed to demonstrate how his defense was impaired by the inadequacy of the information. Id.

Here, even if we were to agree with Baston that the his case was akin to Marshall, we would come to the same conclusion as the Marshall court, i.e. that any defect in the charging information was not fundamental error. The charging information alleged that

Baston molested A.P. on a specific date and location and Baston has failed to demonstrate how his defense was impaired by the alleged inadequacy of the information.

Moreover, here we are of the opinion that the information charged multiple means of establishing one crime—child molesting. Thus, this case is more akin to Cliver v. State, 666 N.E.2d 59 (Ind. 1996). In Cliver, the defendant was charged with two counts of conspiracy to commit murder. The State moved to amend the charging information so that it alleged various alternative acts as the basis for the conspiracy convictions, connected by the conjunction "or." Id. at 67. On appeal, the defendant claimed that this made it possible for different jurors to reach a guilty verdict upon different bases, making it impossible to determine whether the jury had returned a unanimous verdict. In rejecting the defendant's claims, our supreme court wrote:

> Clearly, the State may allege multiple acts in one count of an offense. See Ind. Trial Rule 8(E)(2).[3] Moreover, the United States Supreme Court has "never suggested that in returning general verdicts . . . jurors should be required to agree upon a single means of commission, any more than . . . indictments [are] required to specify one [*actus reus*] alone." In criminal cases, as in all litigation, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line." Id. [Here, t]he State merely presented the jury with alternative ways to find the defendant guilty as to *one element*.

Id. (quoting Schad, 501 U.S. at 631-33).

And in Vest, the defendant was convicted for resisting law enforcement after fleeing from three different police officers. The charging information alleged that Vest

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[3] Trial Rule 8(E)(2) states in relevant part:

> A pleading may set forth two [2] or more statements of a claim or defense alternatively or hypothetically, either in one [1] count or defense or in separate counts or defenses. When two [2] or more statements are made in the alternative and one [1] of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.

knowingly fled from "Geoffrey Barbieri and/or Josh Taylor and/or Joel Anderson." 930 N.E.2d at 1227. On appeal, Vest argued that the charging information was duplicitous. The Vest court held that the charging information alleged only a single instance of resisting law enforcement and properly joined all allegations into a single count. Id. at 1228. "The police officers were the equivalent of 'alternative means' by which Vest accomplished his resisting and the jurors were not required to agree on which particular officer Vest fled." Id. The court therefore held that there was no error, let alone fundamental error, in the charging information.

The same is true here. The State charged Baston with one crime—child molesting—under one subsection of one statute. The charging information alleged multiple acts, either of which would form the basis of the same crime. That different jurors may have relied upon different pieces of evidence is of no moment, because the jury was merely presented with alternative ways to find Baston guilty as to one element of the crime of child molesting. See Cliver, 666 N.E.2d at 67; Vest, 930 N.E.2d at 1227-28.

The other case to which Baston cites is distinguishable from the present case. In Lainhart v. State, 916 N.E.2d 924 (Ind. Ct. App. 2009), the defendant was charged with a single count of intimidation against three different people, each of whom was allegedly threatened at a distinct period on the night in question. In contrast, here, there was only one victim alleged, and the charging information simply presented the jury with alternative means by which Baston accomplished the one crime of child molesting against one victim.

In Scuro v. State, 849 N.E.2d 682 (Ind. Ct. App. 2006), we held that it was possible that the jury's verdict was not unanimous where the defendant was charged with one count of disseminating matter harmful to minors as to one victim based on an unspecified incident and where there was evidence of three instances of dissemination as to that victim. And in Castillo v. State, 734 N.E.2d 299 (Ind. Ct. App. 2000), trans. granted, summarily aff'd in relevant part, 741 N.E.2d 1196 (Ind. 2001), the State charged the defendant with one count of dealing cocaine, but the State presented evidence at trial of two separate instances of dealing. On appeal, we concluded that it was possible that some jurors believed that Castillo had committed the earlier dealing while others believed he had committed the dealing which occurred later the same day, thus permitting a non-unanimous verdict. Id. at 304. The present case is distinguishable from both Scuro and Castillo in that Baston was alleged to have committed two acts, either of which would constitute child molesting, all as part of the same incident.

It is important to remember that the question before us is not whether the charging information would have survived a timely objection. Because Baston failed to object and waived his claim of error, we only need decide whether the alleged duplicity in the charging information constituted fundamental error. Under the facts and circumstances of the present case, we cannot say that Baston has established that the charging information drafted in the alternative amounted to fundamental error. See Marshall, 602 N.E.2d at 149.

II. Insufficient Charging Information

In a related claim, Baston argues that the charging information did not contain a plain, concise, and definite written statement of the essential facts constituting the offense he was charged with. The failure to state the essential facts, Baston claims, significantly impaired his ability to anticipate the proof at trial and prepare a defense. Baston again acknowledges that he failed to object to the charging information before trial, and his claim is therefore waived and only reviewable for fundamental error. See Vest, 930 N.E.2d at 1225-26.

Baston argues that the charging information contained no specific factual allegation other than the defendant's name and is therefore fatally defective. In support of this proposition, Baston cites Griffin v. State, 439 N.E.2d 160 (Ind. 1982). In that case, the information charging the defendant with receiving stolen property did not allege what property was stolen and from whom it was stolen, nor where the defendant had received the stolen property or from whom he had received it. Id. at 161. The court therefore held that the charge was "totally inadequate in informing him about what he should defend against and his conviction[.]" Id. at 162.

Baston claims that the information charging him is similarly defective. We disagree. The charging information here explicitly alleged the date he committed his molestation, the place where he committed it, the acts by which he molested the victim, and identified the victim by her initials. We agree with the State that Baston has not provided any explanation of how the information prejudiced him in maintaining his

defense. We therefore cannot say that the charging information constituted fundamental error.

III. Spoliation Jury Instruction

Baston claims that the trial court erred in refusing his tendered jury instruction on spoliation of evidence. The manner of instructing the jury is left to the sound discretion of the trial court. Rogers v. State, 897 N.E.2d 955, 962 (Ind. Ct. App. 2008), trans. denied. We will not reverse the trial court's ruling unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. Id. Jury instructions must be considered as a whole and in reference to each other, and even an erroneous instruction will not constitute reversible error if the instructions, taken as a whole, do not misstate the law or otherwise mislead the jury. Id. In reviewing a trial court's decision to give or refuse a tendered instruction, we consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other given instructions. Id.

Spoliation consists of "'[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usually a document. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible.'" Cahoon v. Cummings, 734 N.E.2d 535, 545 (Ind. 2000) (quoting Black's Law Dictionary 1409 (7th ed. 1999)). The exclusive possession of facts or evidence by a party, coupled with the suppression of the facts or evidence by that party, may result in an inference that the

production of the evidence would be against the interest of the party which suppresses it. Id.

As noted above, the initial investigating officer, Officer Wilson, took photos of an undeveloped area where Baston's brother said Baston had ridden his four-wheeled vehicle on prior occasions. When Detective Rohfling took over the investigation, Officer Wilson told Detective Rohfling about the digital photographs he had taken, but did not provide them to Rohfling. Officer Wilson later deleted these digital photographs.

At the conclusion of the trial, Baston tendered an instruction which provided:

> There has been testimony regarding photographs taken during the initial investigation of this matter that neither the prosecutor nor law enforcement made available and were destroyed.
>
> If you find that the unavailability or destruction of these photographs is unexplained you may presume that the photographs would have been unfavorable to the prosecution.

Appellant's App. p. 158.[4] Baston claims that this instruction was a correct statement of the law, that there was evidence to support the giving of the instruction, and that the substance of the instruction was not covered by the other given instructions.

The State cites authority for the proposition that, before an inference can arise that the missing or destroyed evidence was unfavorable to the State, there must be evidence of bad faith on the part of the State. See Jewell v. State, 672 N.E.2d 417, 424-25 (Ind. Ct. App. 1996) (holding that trial court properly refused spoliation instruction, noting that defendant had failed to argue that police and exercised bad faith in failing to preserve

[4] On appeal, Baston also refers to notes taken by one of the initial investigating officers. His tendered instruction clearly referred only to the digital photographs which were deleted. We therefore limit our discussion to the photographs.

evidence from crime scene), trans. denied. This would seem to conflict with the subsequent holding in Cahoon, approving a jury instruction which permitted the jury to presume that unaltered evidence would have been unfavorable to the party who had altered the evidence where such alterations were either "unexplained" or "intentional," with no specific requirement of bad faith.

We need not resolve any potential conflict between these cases because even if we concluded that the trial court did err in refusing the tendered instruction, we would conclude that any error was harmless. Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence, and the instruction would not likely have impacted the jury's verdict. Atwood v. State, 905 N.E.2d 479, 486 (Ind. Ct. App. 2009), trans. denied.

Here, the deleted photographs were of an undeveloped area that Baston's brother told the investigating officer that Baston had driven his four-wheeled vehicle on prior occasions. Baston does not explain how these photographs of an area that might, or might not, have been the area where A.P. was molested were so vital that their destruction prejudiced his substantial rights. Given the strength of the evidence against him, including A.P.'s testimony clearly stating that Baston molested her and the DNA evidence implicating Baston, we conclude that any potential error in refusing Baston's spoliation of evidence instruction was harmless.

IV. Improper Aggravating Factors

Baston next claims that the trial court erred in sentencing him by relying upon two allegedly improper aggravating factors. We review sentencing decisions for an abuse of

discretion. Anglemyer v. State, 868 N .E.2d 482, 490 (Ind. 2007). A trial court may abuse its discretion by entering a sentencing statement that: (1) includes reasons for imposing a sentence not supported by the record, (2) omits reasons clearly supported by the record, or (3) includes reasons that are improper as a matter of law. Id. at 490-91. Under the current advisory sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence. Id. at 491. Thus, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. Id.

A. *Element of the Offense*

Baston first claims that the trial court improperly used an element of the offense as an aggravating factor. To be sure, cases decided under the pre-2005 amendments to our sentencing scheme consistently held that a trial court could not use a factor constituting a material element of the offense as an aggravating circumstance to justify an enhanced sentence. See, e.g., Johnson v. State, 687 N.E.2d 345, 347 (Ind. 1997). However, under the current post-Blakely advisory sentencing scheme, a material element of a crime *may* also form an aggravating circumstance to support a sentence greater than the advisory, although perhaps not a maximum sentence. Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008).

Here, Baston did not receive the maximum sentence based solely upon a material element of the crime for which he was convicted. Instead, the trial court found as an aggravating factor that the victim was under the age of twelve, which is a statutorily-permitted aggravating factor. See Ind. Code § 35-38-1-7.1(a)(4) (2008). Moreover, it is

never improper to consider particularly heinous facts or situations as warranting an increased sentence. McElroy v. State, 865 N.E.2d 584, 590 (Ind. 2007).[5] Here, Baston's victim was only six years old, well under the statutory age element of child molesting. See Ind. Code § 35-42-4-3 (2007) (requiring victim of child molestation be under fourteen years of age). Accordingly, we cannot say that the trial court relied on an improper aggravator when it considered that A.P. was under the age of twelve.

B. *Position Having Care, Custody, or Control*

Baston also claims that the trial court improperly considered as an aggravating factor that he was "in a position having care, custody, or control of A.P." Tr. p. 1280; see also I.C. § 35-38-1-7.1(a)(8). Baston argues that he was not in a "position of trust" with A.P. because he had only been with her on a few prior occasions, and notes that the molestation occurred on a ten to fifteen minute ride on Baston's four-wheeler.

Baston's argument on this issue is well taken. See Tyler v. State, 903 N.E.2d 463, 469 (Ind. 2009) (concluding that defendant was not in a position of trust when babysitting for young children because "he was not regularly in a position of control over them . . . the record [did] not suggest that he actively sought opportunities to supervise the children, and there [was] no evidence of his having sought to establish a prior position of trust or confidence."). But even if we conclude that the trial court improperly applied this aggravating factor, a sentence may be upheld if other valid aggravators exist. Horton v. State, 936 N.E.2d 1277, 1285 (Ind. Ct. App. 2010). "[W]e need not remand for

[5] Even under the pre-2005 amendments to our sentencing scheme, it was proper for a trial court to find the particularized circumstances of the crime as aggravating. See Henderson v. State, 769 N.E.2d 172, 180 (Ind. 2002).

resentencing if we can 'say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.'" Id. at 1286 (quoting Anglemyer, 868 N.E.2d at 491). Given the other valid aggravators, we can say with confidence that the trial court would have imposed the same forty-year sentence even if it had not improperly relied on the "position of trust" factor.[6]

C. *Violation of Bail Conditions*

The trial court also found as an aggravating factor that Baston violated the terms of his bail, which was subsequently revoked as a result. One of the conditions of Baston's bail was that he "shall have no contact with the victim(s) or the State's witness(es)." Appellant's App. p. 26. The trial court later revoked Baston's bond because he had contacted his brother, Joe Baston. On appeal, Baston claims that there was no evidence that he knew that his brother was a State's witness. In support of this claim, he notes that the trial court issued an order requiring Baston to have no contact with three of the State's witnesses, none of which were Baston's brother Joe.

However, the trial court also ordered the State to provide the defense with "[t]he names and last known address of persons whom the State may call as witnesses[.]" Id. at 32. In response, the State provided Baston's counsel with a response to this discovery order, which listed five people as State's witnesses, including Baston's brother Joe. Id. at

[6] We also note that any error in sentencing is harmless if the sentence is not inappropriate. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007) (noting that when trial court errs in sentencing defendant, court on appeal may exercise authority to review and revise sentence, instead of remanding for resentencing); Mendoza v. State, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (noting that even if trial court abuses its discretion in sentencing, we will not remand for resentencing if the sentence imposed is not inappropriate), trans. denied. As discussed below, Baston's sentence is not inappropriate.

40. At the revocation hearing, the State provided evidence that Baston repeatedly sent text messages, some regarding the charge Baston was facing, to his brother Joe despite the conditions that he have no contact with the State's witnesses. Under these facts and circumstances, the trial court did not abuse its discretion in considering as an aggravating factor that Baston violated the conditions of his bail.[7]

V. Inappropriate Sentence

Lastly, Baston claims that his sentence is inappropriate. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise authorized by statute if, "after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Although we have the power to review and revise sentences, "[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). It is on the basis of Appellate Rule 7(B) alone that a criminal defendant may now challenge his sentence "where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue." Anglemyer, 868 N.E.2d at 491. It is the defendant's burden on appeal to

[7] To the extent that Baston claims that the trial court's decision to revoke his bail was a denial of due process, this argument is waived for failure to make a cogent argument. See Perry v. State, 904 N.E.2d 302, 307 (Ind. 2009); Ind. Appellate Rule 46(A)(8)(a).

persuade the reviewing court that the sentence imposed by the trial court is inappropriate. Id. at 494.

Considering the nature of the offense, Baston opportunistically took a young child from a party, drove her to a secluded area, and molested her. Although Baston invites us to consider the things he did *not* do to his victim, on appeal we do not "determine whether a worse offender could be imagined, as it is always possible to identify or hypothesize a significantly more despicable scenario, regardless of the nature of any particular offense and offender." Wells v. State, 904 N.E.2d 265, 274 (Ind. Ct. App. 2009), trans. denied.

Baston's character further supports the trial court's decision to impose a forty-year sentence. Baston not only violated the conditions of his bail, as set forth above, he also has a history of criminal and delinquent behavior which began in 1987 when he was convicted in Ohio of receiving stolen property. He was convicted in 1996 in Ohio of felony aggravated assault. And at the time he committed the instant offense, he was wanted in Ohio for misdemeanor charges of criminal damaging. Despite claiming in the presentence investigation report that he did not have any juvenile record, the report indicates that Baston also had a relatively lengthy history of juvenile delinquency, including operating a motor vehicle without a license, drug abuse, violating probation, carrying a concealed weapon, and disorderly conduct. After giving due consideration to the trial court's sentencing discretion, and in light of the nature of the offense and the character of the offender, we cannot say that Baston has met his burden of demonstrating that his forty-year sentence is inappropriate.

Conclusion

Baston has not established that the charging information constituted fundamental error. Any error in the trial court's refusal to instruct the jury regarding spoliation of evidence was harmless. The trial court did not abuse its discretion in finding aggravating factors, and Baston's sentence is not inappropriate.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.